No. 17070

United States
COURT OF APPEALS
for the Ninth Circuit

ALBINA ENGINE & MACHINE WORKS, INC.,
an Oregon Corporation,

Appellant,

v.

HERSHEY CHOCOLATE CORPORATION,
a Delaware Corporation, et al.,

Appellees.

Upon Appeal from the United States District Court for the District of Oregon.

HONORABLE JOHN F. KILKENNY, Judge.

BRIEF OF APPELLEE LUCKENBACH STEAMSHIP COMPANY, INC. IN REPLY TO APPELLANT

WOOD, WOOD, TATUM, MOSSER & BROOKE,
ERSKINE WOOD,
1310 Yeon Building,
Portland 4, Oregon,
Attorneys for Appellee Luckenbach Steamship Company, Inc.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 4-61

INDEX

TABLE OF AUTHORITIES

No. 17070

United States
COURT OF APPEALS
for the Ninth Circuit

ALBINA ENGINE & MACHINE WORKS, INC.,
an Oregon Corporation,

Appellant,

v.

HERSHEY CHOCOLATE CORPORATION,
a Delaware Corporation, et al.,

Appellees.

Upon Appeal from the United States District Court for the District of Oregon.

HONORABLE JOHN F. KILKENNY, Judge.

BRIEF OF APPELLEE LUCKENBACH STEAMSHIP COMPANY, INC. IN REPLY TO APPELLANT

THE FACTS

These are stated in the Trial Court's Opinion and Supplemental Findings.

APPELLANT'S POINT I

This point, that the Trial Judge should not have adopted his Opinion as a Finding of Fact, is without

merit. Opinions are frequently adopted as Findings of Fact. Appellant does not urge this as a ground for reversal and we say no more about it.

APPELLANT'S POINT II

This point is that the Court erred in holding that Luckenbach was not liable to the libelants. It involves the Fire Statute.

There is only one appellant,—Albina. Hershey Chocolate Corporation and the other cargo owners are satisfied with the Decree below, denying them damages against Luckenbach, and have not appealed.

Appellant devotes much of its argument attempting to show that the Trial Court erred in holding that Luckenbach, because of the Fire Statute, was not liable to libelants, the cargo owners.

We cannot see how this can help Albina. Albina has no concern with the question. It was an issue solely between the cargo and Luckenbach. The cargo owners could have raised it, by appealing, if they had wanted to. But they have not. They are satisfied with the Trial Court's decree, and have not appealed.

Albina is in no position to raise this question. As to Albina, it is a collateral and extraneous issue. And what can it avail Albina? Even if it prevailed on this issue, it could not thus shift its own liability for the fire. And the cargo owners have now chosen to pursue Albina alone.

Since, in our view, this question is moot, we shall not devote too much space to it. But because it has been raised, we cannot ignore it altogether. The Trial Court's Opinion and Findings (R. 72-92) correctly interpret and apply the Fire Statute to exonerate Luckenbach from cargo damage. We rely on that, and now do little more than summarize the guiding principles and apply them.

1. The fire must be *caused* by the neglect of the shipowner.

> "The neglect which will deprive the shipowner of protection is a neglect which caused the fire. The statute expressly so limits it." *The Ida,* 75 F.(2d) 278, 279 (CCA, 2nd Circuit).

2. The fire must have been caused by the *personal* neglect of the shipowner.

> "Since 'neglect of the owner' means his personal negligence, or in case of a corporate owner, negligence of its managing officers and agents as distinguished from that of the master or subordinates," . . . etc. *Consumers Import Co.* v. *Kabushiki Kaisha etc.*, 320 U.S. 249, 252; 88 L. Ed. 30, 32.

In short, there must be privity.

3. The shipowner, i.e., the managerial officer, may delegate matters to be done.

> "The courts have been careful not to thwart the purpose of the Fire Statute by interpreting as 'neglect' of the owners the breach of what in other connections is held to be a non-delegable duty." *Earle & Stoddardt* v. *Ellerman's Wilson Line,* 287 U.S. 420, 427, 77 L. Ed. 403, 407. Also, *Consumers Import Co.* v. *Kabushiki Kaisha, etc,* supra, where the work was "properly delegated." 88 L. Ed. at page 32.

4. There are no conditions attached to application of the Fire Statute, such as obeying Coast Guard Regulations, or making the ship seaworthy, or anything like that.

> "The Fire Statute, in terms, relieves the owners from liability 'unless such fire is caused by the design or neglect of such owner'. The statute makes no other exception from the complete immunity granted." *Earle & Stoddardt* v. *Ellerman's Wilson Line,* supra.

See also *Hoskyn & Co.* v. *Silver Line,* 143 F.(2d) 462.

5. The Pennsylvania Rule does not apply. *Automobile Insurance Co.* v. *United Fruit Co.,* 224 F.(2d) 72, 75.

> "As already stated, the benefit of that statute (the Fire Statute) is not legislatively conditioned upon compliance with the safety act, 46 USCA §463." *Fidelity-Phenix Fire I. Co.* v. *Flota, etc.,* 205 F.(2d) 886, 888.

6. Since the Fire Statute is a statute of exoneration and not of limitation, it differs from the limitation statute in putting the burden of proof throughout on the cargo owner to show: That the fire was caused by negligence of the shipowner; and that the causer of the fire was a managerial officer; that through such officer the shipowner was privy to the cause of the fire. Judge Roche has stated the law succinctly:

> "To deprive the owner of the benefit of this statute, the claimant must prove (1) the cause of the fire, (2) the existence of design or negligence, and (3) that such design or negligence was that of the owner himself or his managing agent." *Connell Bros. Co.*

v. *Sevenseas Trading & Steamship Co.*, 111 F. Supp. 227, 229.

To the same effect are:

The Strathdone, 89 Fed. 374.
Hoskyn & Co. v. Silver Line, 143 F.(2d) 462.
Fidelity-Phenix Fire I. Co. v. Flota Mercante Del Estado, 205 F.(2d) 886.
The Cabo Hatteras, 5 F. Supp. 725.

Opposed to this, appellant, on pages 40 and 41 of its Brief, cites *Verbeeck* v. *Black Diamond* (CA 2, 1959), 269 F.(2d) 68, and Gilmore and Black. The statement in the *Verbeeck* v. *Black Diamond* case is erroneous. It cites Gilmore and Black, not perceiving that Gilmore and Black, in their footnote, were not stating what the law is on burden of proof, but only what they, the authors, think it *ought* to be. For a discussion of this, see the article in the Appendix to this Brief. Fortunately, the *Verbeeck* opinion was vacated, and the previous erroneous statement of law was expressly repudiated. It is so stated in the majority opinion, and pointed out in Judge Clark's dissent. 273 F.(2d) 61.

Applying these principles, the only person who could possibly be deemed a managerial officer was Sterling. And it is plain as day that he did not *"cause"* the fire. It was *caused* by Albina. Not only that, but Sterling did not even know that the welding was to take place on the forward ladder in No. 5 hold. He had given orders to repair the after ladder in that hold, after it had been cleared of cargo, and then left the ship. If the work had been done at the after ladder there could not possibly have been a fire because the only

cargo there was metal conduit, and it had already been removed. Albina's welders, learning that the missing rung was on the forward ladder, proceeded without instructions, and accepting the conditions there, to weld that ladder, with the resultant fire.

Neither can the omission in the fire line be attributed to Sterling. He had delegated to the chief engineer the handling of this and substituting an adequate water supply, as he had a right to do. *Earle & Stoddardt* v. *Ellerman's Wilson Line*, supra; *Consumers Import Co.* v. *Kabushiki Kaisha, etc.,* supra. See also same case below sub nom *"Venice Maru,"* 39 F. Supp. 349.

He left the ship about 3:00 o'clock P.M. (R. 317), about the time the pipe was being removed (R. 434).

Furthermore, it is no prerequisite to the Fire Statute that the ship be seaworthy. *Earle & Stoddardt,* supra.

It is impossible, under any view, to connect Sterling with the fire.

Radovich was a very minor employee (Finding VI). He was a dock foreman with the high sounding and flattering title of "Marine Superintendent," but whose sole function was hiring longshore gangs and attending to the loading and discharge of cargo (R. 214), and acting as liaison man between the dock and his superiors in the uptown office (R. 214, 220). He had nothing whatever to do with repairs (R. 214, Finding X). His sole relation thereto was to clear cargo, *when requested* and *to the extent requested,* away from repair-work, and have the longshoremen out of the hold.

It is said in Appellant's Brief, p. 39, that Radovich "expressly ordered the work to be done at that time" on the forward ladder. This is not true. All he did was to inform Brewer of Albina that it was the forward, not the after, ladder that was in need of repair, and that between 6:00 and 7:00, the longshoremen would be out of the hold. He gave no orders for the repair, nor any instructions, nor had he any authority to do so. Here is the testimony. Brewer was testifying on recross-examination:

"Q. I think there is slight distinction there, possibly. Mr. Radovich told you, as I understand your testimony, that the rung was in the forward ladder. that is right, is it? A. Yes.

Q. And if any repair was to be made, that was the place where it was. I suppose that was generally the conversation, wasn't it? A. yes.

Q. But he didn't order you or give you any instruction to go ahead and repair it, did he?

A. No. He said to make the repair—

Q. Didn't you know that he had no authority to order the repairs?

Mr. Gearin: We object to the question, your Honor.

Mr. Wood: I want to ask him.

The Court: I guess I have to decide that eventually, anyway.

Mr. Gearin: I will withdraw my objection, your Honor.

Q. (By Mr. Wood): You know that, don't you?

A. Whether or not he had authority to order repairs or not?

Q. Yes.

A. We frequently looked to him as to the time that we could do them. I mean it was up to him when the space would be available.

Q. But he didn't give you any specific order or

instruction to go ahead and repair that ladder, did he?

A. It happened just the way I stated it. Whether it was an order or not, he said—

Q. Isn't it a fact all he told you was that it was the forward ladder that had the broken rung in it?

A. Yes, sir.

Q. That is all he told you?

A. Correct.

Mr. Wood: That is all." (R. 503-4).

There was no discussion about cargo (R. 184). Both the Agreed Statement of Facts (R. 53) and the Court's Opinion (R. 75), state: "Without further instruction they proceeded to work on the forward ladder."

Even if Radovich could be considered, as claimed by appellant, to be a managerial officer, as emphatically he was not, the authorities already cited show that he would have had a perfect right to delegate to Albina, the expert, the job of taking the proper precautions to do the welding in a safe manner,—calling for the further removal of cargo if desired, or building proper isolation screens, or having water handy, or anything else. Radovich was not an expert welder. Albina was.

As far as the removal of the portion of the fire line is concerned, Radovich had nothing whatever to do with it, and, as far as the evidence shows, did not even know of it.

The argument on pages 43-45 of Appellant's Brief that Sterling and Radovich were responsibile for the spread of the fire, and that because the fire damage cannot be segregated, Luckenbach is liable for the whole of it, is without merit.

They cite *American Mail Line, Ltd.* v. *Tokyo Marine Fire Ins. Co.,* 270 F.(2d) 499. The Trial Court easily distinguished this case (R. 83), and rejected appellant's argument in these words:

> "Here immediate action was taken to control the fire. In this case, there is no evidence that anyone failed to use reasonable diligence after the start of the fire." (R. 83-84).

But appellant says this is not enough (Brief 45). Appellant says that Sterling's alleged negligence in not personally following up his order to the chief engineer to provide substitute water on the fire line, though occurring before the fire, resulted in damage after the fire, and thus brings him within the *Tokyo Marine* case. No authority is cited for this novel theory. Of course there was no negligence. When Sterling delegated this job to a competent officer, the chief engineer (authorities cited), he did all that could be expected of him and cannot be charged with any neglect.

Sterling left the ship about 3:00 o'clock (R. 317), about the same time the pipe was being removed (R. 434).*

---

* In appellants' statement of facts, on p. 36 of their Brief, they say that Sterling was, "in his own words" "aboard the ship until about a quarter to 4:00"; and the removal of the fire main had been completed "no later than 3:00 P.M.," and that the coupling from the ship to the dock was almost directly at the gang-plank going ashore; and that Sterling, in going ashore, must have walked right past this place, and should have observed that the coupling had not been made. There are several answers to this: First, Sterling, having delegated the job to a competent officer, could rely on the delegation. Second, there were several methods of putting water on the fire line; coupling to the dock was not the only one (R. 321-323). Sterling, having delegated this to the chief engineer, could leave it to that officer's choice.

So much for a discussion of Luckenbach's non-liability to cargo under the Fire Statute. The question does not concern Albina, and is moot. The Trial Court's Findings of Fact, including the Opinion, fully cover it. Perhaps we should have let it go at that, and are a little apologetic for not having done so. However, since it brings out matters likewise pertinent to what follows, we will let it stand.

APPELLANT'S POINTS III, IV AND V

These may be grouped together. In sum, they are that the Court erred in holding Albina liable to Luckenbach.

The question is whether Albina is liable to Lucken-

Non-connection to the dock did not indicate that another method had not been used. Third, appellants have not correctly interpreted the testimony referred to. Sterling did not say "in his own words" that he was aboard the ship until "about a quarter to 4:00" (R. 317). What he did say was: "I was aboard until 3:00 o'clock—about a quarter to 4:00, I went over—my ankle started to paining me so bad, I injured my ankle in the morning in the car. Q. I see. And then you left the ship then about a quarter of 4:00? A. I had to. I had to go and take care of my ankle. It was paining me so bad that I couldn't walk on it." (R. 317). We interpret this to mean that he was aboard until 3:00 o'clock, then interrupted himself to say that at about a quarer to 4:00 he went over,—(the sentence is unfinished), but apparently was going to his car or some other place to get relief for his ankle. The words that he left the ship "about a quarter to 4:00" were not Sterling's; they were the questioner's. And all Sterling said was—"I had to. I had to go and take care of my ankle." The fire line pipe was not removed, as counsel state, "no later than 3:00 P.M." The witnesses said that they *thought* it was removed at *about* that time (R. 434, 521). It thus appears that Sterling was not on the ship, as intimated, for a period after the time for making the connection; but on the contrary, he left at just about the time the removal of the fire line was in process of being completed. Certainly he could not be expected to hang around with a bad ankle to see that his order would be carried out.

bach for the damage to the ship and for Luckenbach's expenses. Albina says "No", and that on the contrary, Luckenbach owes Albina its bill for repairing the fire damage to the ship.

The basic contention made by Albina is that the Trial Court erred in holding that Albina's negligence was the sole proximate cause of the damage (Br. p. 47). The first point under this is,—A, that Luckebach was negligent in failing to remove cargo.

Appellant then refers to Luckenbach's "direction" that the welding was to be performed on the forward ladder, and that it was Radovich's duty to remove the inflammable cargo from the area. We have already shown that Radovich gave no "direction" about this at all. Our Brief, pp. 7, 8. The Trial Court's Findings settle it: "Without further instructions, they proceeded to work on the forward ladder." (R. 75). The same is expressly stated in the Agreed Statement of Facts in the Pretrial Order (R. 53). And of course it is obvious that, since the ladder was accessible to the welders, and the welding could have been safely done if they had taken the proper precautions (Finding XIII), there would be no occasion at all for Radovich to remove any cargo until, and to the extent, that the welders of Albina, the expert, requested it. "Radovich had nothing to do with the repairs to the ladders." (Finding X).

The next point is B—that Luckenbach was negligent in failing to supply water in the ship's fire line. This has been discussed already. Finding XVII settles it: "There was no contract or understanding between Luckenbach

and Albina, or any obligation, that Luckenbach would have its fire line in readiness and available during welding, and Albina in no way relied on it when it undertook the job." This Finding is amply supported by the testimony. All that Albina can claim is that Brewer of Albina was present when Sterling and the chief engineer were discussing removal of the main section of the fire line and providing substitute fire protection (R. 489). but he was an onlooker and no promise was made to him, and that generally on the waterfront Albina "assumes" that fire protection will be available (R. 497). But both Brewer and Bailey were indifferent about it. Brewer did not have in mind any particular type of fire protection (R. 497), and Bailey made no inquiries about it whatever (R. 183). The same, of course, may be said of the welders. They went on the ship without notifying anybody, or asking for any hose, or any other fire protection, and undertook the welding independent of the ship, relying on themselves to handle the situation. In fact their standing orders from Albina were to provide their own fire protection (R. 182-183; 184).

The other points, namely, C—that Luckenbach was negligent in failing to have the vessel competently manned because the crew did not know of the interruption in the fire-line; and D—that Luckenbach was guilty of a statutory fault because it allegedly did not adhere to a Coast Guard regulation; and E—that the vessel was unseaworthy because of the cargo close to the forward ladder, and the inoperable condition of the fire line, and the ignorance of some of the crew as to this fact,—

all of these may be discussed shortly together. They all come to the same thing, that the vessel was unseaworthy. But unseaworthiness is no defense to Albina.

The short of it is that Albina breached its contract, as an expert, to do an expert's job. It was as an expert welder that it was hired. Unseaworthiness does not touch that.

In *Ryan Stevedoring Co.* v. *Pan Atlantic SS Corp.,* 305 U.S. 124, 100 L. Ed. 133, the ship was unseaworthy because of cargo stowage. In *Weyerhaeuser* v. *Nacirema,* 355 U.S. 563, 2 L. Ed. (2d) 491, the winchman's shelter was unseaworthy. In *Crumady* v. *Fisser,* 3 L. Ed. (2d) 413, the "cut off" device on the winch was unseaworthy. In *Calmar* v. *Nacirema,* 266 F.(2d) 79, the cable of the cargo light was unseaworthy. In the latest case, *Waterman SS Corp.* v. *McNamara,* 5 L. Ed. (2d) 169, the cargo stowage, like *Ryan,* was unseaworthy. In all of these the unseaworthy feature was a very part of the contract to be performed. It was an ingredient of it. Yet its unseaworthiness did not excuse the contractor. The fire line of the ROBERT LUCKENBACH was not a part of the contract to be performed; nor in any way connected with it, so, a fortiori, can in no way be used as an excuse by Albina.

It may also be remarked that there was certainly no unseaworthiness as alleged, either closeness of cargo to the ladder, or the interruption in the fire line, until that alleged unseaworthiness was "brought into play" by the gross negligence of Albina's welders. Just as the unseaworthiness of the defective winch in *Crumady* was

brought into play by the stevedore. The latest decision of all,—*Waterman SS Corp.*, supra, states the same thing: "The warranty (of good performance by an expert) may be breached when the stevedore's negligence does no more than call into play the vessel's unseaworthiness." 5 L. Ed. (2d) at page 171.

The above are all stevedore cases. But the same principles apply to repairmen.

Amato v. U.S.A. 1. Bethlehem, 167 F. Supp. 929.
Albina Engine & Machine Works v. American Mail Line, Ltd., 263 F.(2d) 311.
Boothe SS Co. v. Meier, et al., 262 F.(2d) 310.

And of course it makes no difference whether the suit is for "indemnity" or, as here, for damages. As said by Judge Mathes in the *Hugev* case, the right to indemnity "is nothing more or less than a right to recover damages for breach" of contract. 170 F. Supp. 601, 607, citing authorities.

How flagrantly Albina breached its contract is plain:

Its isolation screen of plywood walk-boards was so ineffectual that at the very *first* flash of welding, the burning metel either rolled under or flew over the screen, or probably did both. This did not happen later during the course of the work. It happened at the very outset, and shows how flimsy the protection was. The screen, besides being open underneath, was only 4 feet high, and the welding was within 1 foot of the top of it. The propensity of welding sparks to fly—to arc—is well known.

There was no water, except in the longshomen's can —completely inadequate.

No fire extinguishers were present.

No hose attached to any hydrant and dropped into the hold, as the Portland Police Code required, was present, although apparently the welders had hoses with them on the dock right by No. 4 hatch (R. 384), and there were hydrants "all over" the dock (R. 324, 511). If their own hoses were insufficient, they could have borrowed some from the ship. They could even have had water ready at hand by the ship, if they had notified the ship in advance to prepare for it.

Finally: They were the sole judges of the conditions. If the conditions were not safe, or could not be made safe, it was their duty "to stop all operations as soon as it should have realized that it was unsafe to proceed without the danger being corrected." (*Revel* v. *American Export & Whitehall Terminal Co.,* 162 F. Supp. at p. 287).

The gross negligence in performing the contract is clear, and well deserved the rebuke of the Trial Judge and his Finding that it was the sole cause of the fire.

In conclusion we say that Albina's appeal is entirely on questions of fact, where the Findings of the Trial Judge are amply supported by evidence. They are so obviously right that they do not need the support of the "clearly erroneous" rule. But under that rule, affirmance seems to us absolutely required.

Respectfully submitted,

WOOD, WOOD, TATUM, MOSSER & BROOKE,
ERSKINE WOOD,
1310 Yeon Building,
Portland 4, Oregon.

APPENDIX

American Bar Association Journal
November, 1960, at p. 1162

PRIVITY UNDER THE FIRE STATUTE BURDEN OF PROOF

What is known in admiralty law as the Fire Statute, 46 U.S.C., §182, reads as follows:

> Loss by fire. No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.

The "design or neglect of such owner" must be his personal neglect. In the case of corporations, it must be the design or neglect of some executive or managerial officer of the corporation in control of those activities which caused the fire. *Walker* v. *The Western Transportation Co.,* 3 Wall. 150, 18 L. ed. 172; *Consumers Import Co.* v. *Kabushiki Kaisha,* 320 U. S. 249, 88 L. ed. 30.

In such a case the corporation is held to be "privy" to the cause of the fire, and therefore liable. In short, it is the old doctrine of "privity" or *personal* fault, familiar in the limitation of liability cases under 46 U.S.C., §§183 *et seq.*

> The same rule is applicable to the words "privity or knowledge" in §4283 (46 U.S.C. §183) *Craig* v. *Continental Ins. Co. of N. Y.,* 141 U. S. 638; 35 L. ed. 886.

But there similarity ends. For there is an important difference between the two statutes. Under the limitation of liability statute, the shipowner, seeking to limit his liability, has the *burden of proof* to show that he was *not* privy to the cause of the loss or damage. Liability having been found against him, he has to prove that he was not personally to blame if he seeks to limit that liability. Naturally, since he seeks to limit a liability already found, he has the burden of proving his right to the limitation. *Coryell* v. *Phipps,* 317 U. S. 406, 87 L. ed. 363; *In re Reickert Towing Line,* 251 Fed. 214.

The Fire Statute is quite different. There the shipowner has no such burden of proof. On the contrary, that burden is on the person seeking to hold the shipowner liable for the fire. He must prove that the shipowner was privy to the cause of it. The two statutes in this respect are diametrically opposed. Thus, in the Fire Statute cases, it has been stated:

> The primary law (the Fire Statute) is, therefore, one of non-liability, except under the conditions stated. From ordinary rules, it is inferred easily that, after the loss has been shown to have arisen from fire, the burden is on those asserting that the fire was caused by the shipowner's design or neglect to prove it, and, indeed, the authorities are to that effect. [*The Strathdone,* 89 Fed. 374.]

> The statute provides immunity for the shipowner from liability for fire damage to cargo "unless such fire is caused by the design or neglect of such owner" (authorities). As there is no claim or reason that the fire was caused by the design of the owner, the issue is narrowed to whether or not it was caused by the owner's neglect. The burden of proving that the neglect of the owner did cause the fire rested upon the libelants . . . [*Hoskyn & Co.* v. *Silver Line,* 143 F. 2d 462, 463.]

> It is well settled that a shipowner is not liable for damages resulting from fire unless libelant proves that the cause of the fire was due to the "design or neglect" of the owner, the burden being upon libelant. [*Fidelity-Phenix Fire Ins. Co.* v. *Flota Mercante Del Estado,* 205 F. 2d 886, 887.]
>
> The burden of proving that the shipowners were guilty of "design or neglect" is, under the statute, cast upon those who allege it—the libelants. . . [*The Cabo Hatteras,* 5 F. Supp. 725, 728.]
>
> To deprive the owner of the benefit of this statute, the claimant must prove (1) the cause of the fire, (2) the existence of design or negligence, and (3) that such design or negligence was that of the owner himself or his managing agent. . . [*Connell Brow. Co.* v. *Sevenseas Trading & Steamship Co.,* 111 F. Supp. 227, 229.]

And 3 Benedict's *Admiralty,* 6th Edition (1959 Supplement) page 55, says:

> The burden of proof that the fire was caused by the design or neglect of the owner is on the libelant.

It is surprising, therefore, and regrettable, to find the Court of Appeals for the Second Circuit fall into the error of stating that:

> Once negligence has been shown the burden of proof of coming within the exemption from liability of the Fire Statute, just as in the similar exception in the limitation statute, 46 U.S.C. §183, is on the owner. [*Verbeeck* v. *Black Diamond Steamship Corp.,* 269 F. 2d 68, at page 71.]

The authorities cited for this statement do not support it at all. Two of them are limitation of liability cases, and the other is a footnote to the text of Gilmore and Black's *Law of Admiralty.* But the footnote does not

say that the law *is* as stated by the court. It only says that, in the opinion of the authorities, it *should* be.

This fails to perceive the essential difference between the two statutes. The limitation statute is a law of *limitation*. The Fire Statute is a law of *exoneration*. The limitation statute concedes that liability has been established, but then allows the shipowner to limit that liability by proving that he was not privy to it. It abolishes the rule of *respondeat superior*. Since it gives the shipowner this privilege, it is only right that the burden of proof should be on him to prove that he is entitled to it.

The Fire Statute, on the other hand, being a statute of exoneration, lays down the condition which the libelant must meet to hold the shipowner liable. It is, as said in *The Strathdone, supra,* a law of "non-liability, except under the conditions stated". One of those conditions is that the fire must have been caused by the personal design or neglect of the shipowner. This is a necessary element in libelant's or plaintiff's case. His right is founded on it. He must prove it, just as the plaintiff must prove scienter in a vicious dog case, or malice in certain types of libel cases, or the blow in an assault case, or any fact in any other case where the law establishes such fact as a basis for the right.

It is to be hoped, therefore, that the courts will take a careful look at the Second Circuit decision before following it.

ERSKINE WOOD

Portland, Oregon